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VIA ELECTRONIC FILING AND HAND DELIVERY

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 01-338; 96-98; 98-147

Dear Ms. Dortch:

During a meeting on October 23, 2002, Bob Rogers, Bernie Rosen, and Tom Valentyn of Norlight Telecommunications, Inc. ("Norlight") and the undersigned met individually with Jordan Goldstein, Legal Advisor to Commissioner Copps, Matthew Brill, Legal Advisor to Commissioner Abernathy, and Christopher Libertelli, Legal Advisor to Chairman Powell. In addition, these same Norlight representatives and I met with Robert Tanner, Jeremy Miller, Ian Dillner, and Tom Navin of the Wireline Competition Bureau.

During the meetings with the staff of the Wireline Competition Bureau, Norlight stressed that the availability of dark fiber remains a critical issue for the future development of competition, even for Norlight, which is one of the few remaining profitable facilities-based competitors in the nation. Norlight advised the staff that it is imperative that the Commission closes loopholes in its current rules that the ILECs exploit to keep competitors from gaining meaningful access to dark fiber. During these conversations, staff requested that Norlight provide additional background information on how the Commission's analysis in the above referenced proceeding should apply given the facts on the ground in Norlight's home markets. This letter responds to that request.

I. Norlight's Markets

Norlight was founded in 1972 as Midwestern Relay Co., offering microwave transmission services throughout Wisconsin. Over the years, Norlight has expanded its service capabilities and its network and has gained a keen knowledge of the many local markets in which is operates, as well as a broader understanding of the Midwestern region as a whole. Norlight owns and operates one of the largest SONET-based fiber optic networks in the Midwest and has the expertise and equipment necessary to construct, operate and maintain all its own facilities, including fiber. The Company now owns and operates facilities in seven states[1] and provides services to customers in various geographic markets within these states and others. These geographic areas include several tier 2 and tier 3 cities, as well as rural and underserved areas.

Norlight is an exception to the general malaise and financial disaster that has gripped the telecommunications sector. However, SBC is currently poised to gain Section 271 approval in Norlight's markets and this will permit it to leverage its monopoly hold on last mile facilities to unfairly ratchet up competitive pressure on carriers such as Norlight. In fact, there is evidence that SBC is already doing so in some of the markets where it has already gained Section 271 approval.[2] In order for Norlight to maintain a level playing field with SBC and thereby compete and grow, it must have access to the essential last mile facilities controlled by SBC. Chief among these, Norlight must have non-discriminatory access to last mile dark fiber.

Norlight is a regional leader in the market for secure, dedicated and integrated data communications, dedicated broadband data services, voice services as well as a wide variety of other network and ancillary services, ranging from construction and management, to calling cards, and even satellite and video services. Norlight specializes in secure private networks that allow business operations with multiple locations throughout the region to communicate using a single, dedicated and secure network. It is so focused on this market that its employees refer to themselves as the "Guardians of Data." These secure services permit, for example, a business or government office with its headquarters in downtown Madison to communicate over a secure, dedicated network with multiple offices in both rural and urban locations spread throughout the region. In addition, Norlight provides long haul network services on a wholesale basis to other carriers.

In terms of customer class, Norlight provides services to small and mid-sized businesses, government agencies and universities. The Company also provides national carriers access to its network at wholesale rates. Private carriage services account for approximately 38.7% of Norlight's revenues, and of this commercial and video data and Internet traffic account for

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[1] Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, and Wisconsin.

[2] *See Joint Complaint for Post-Interconnection Dispute Resolution With Southwestern Bell Telephone, L.P. and Request for Interim Ruling Regarding DS1 UNE Loop Provisioning Issues*, Doc. No. 27001 (filed Nov. 22, 2002) (available at: http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/27001_4_375037.PDF) ("*TX Complaint*").

approximately 67%, switched voice and other traffic accounts for approximately 33%. Norlight's wholesale carrier traffic accounts for the remaining 61.3% of Norlight's revenues. Norlight typically does not provide services to residential end users.

II. Facts Related to the Installation of Fiber

We now turn to the staff's request for additional information regarding the importance of dark fiber to Norlight's future growth and how this relates to the Commission's analysis in this proceeding. Lack of access to ILEC dark fiber will impair Norlight's ability to provide services to customers in the markets it serves because it significantly decreases the pool of customers that Norlight can serve in a cost effective manner. This is because the demand in rural areas is too low to justify the cost of installing duplicative dedicated facilities to serve a single, isolated customer, especially where Norlight must rely upon tariffed special access services.

Recently, Norlight has had to rely upon tariffed services to a greater extent because DS1 UNEs and to a lesser extent DS0 UNEs have become significantly more difficult to obtain from SBC, the dominant carrier in Norlight's markets. This is because SBC has recently instituted a change in its provisioning processes for these facilities that has caused an unprecedented number of DS1 orders to be returned for "lack of facilities" ("LOF"). When a competitor receives a LOF report, it cannot timely provision services previously promised to its customers. This places the competitor in the position of either canceling the customer order, or using SBC's tariffed special access services. The high, non-cost-based special access rates significantly inflate the competitor's cost of providing the service. This often makes the service uneconomical to provide to end-users. As a result, SBC's DS1 UNE policies threaten to drive facilities-based competitors out of the market for serving small business customers. It is not surprising, therefore, that this new procedure is the subject of a complaint proceeding in Texas, where a number of competitors found their LOF rates spike from 5%, to between 20% to 29% virtually overnight.[3]

With regard to constructing fiber facilities, there is little question that actually extending the fiber from the Norlight network to the customer's location is the most costly and time intensive aspect of providing service to end users. Where both dark fiber and "lit" fiber are available, Norlight would prefer to have access to the dark fiber because it is less expensive, and gives Norlight more control over the electronics and time required to light it. Having close control over network components is an important aspect of Norlight's secure service offerings. In addition, the ability to connect a customer in a timely manner is often the deciding factor when a customer chooses a telecommunications service provider. Access to ILEC dark fiber expands Norlight's ability to capitalize on these time sensitive market opportunities.

In the markets where Norlight operates, it is typically faster and less costly to construct facilities in rural areas. In many instances cabling can be run on poles and does not need to be

[3] *TX Complaint* at 10.

buried, which is not often the case in more urban areas. Further, in rural areas even where the cables must be buried it is far easier and less expensive to do than in more urban areas. This is because cable can typically be buried in the "ditch line" at the side of the road. In more urban areas, it is not uncommon to have to dig up the front yards of suburban homeowners or the driveways and parking lots of urban businesses, or worse, tear up busy streets to install fiber. These latter circumstances create significant additional cost and delay to the construction process. Because of these differences, in more rural areas it is not uncommon for a fiber construction crew to be able to bury several miles of cable a day, while in suburban areas a half-mile is considered good, and in urban areas may construction average only a few hundred feet.

III. Market Differentiation

This illustrates that making blanket distinctions based upon geography or customer class would not lead to a rational outcome when applied to the region served by Norlight because gauging the demand with the cost of constructing new facilities requires a case-by-case analysis. Because of this, it is imperative that the Commission make dark fiber available in a meaningful way throughout the Midwest without limitation. In its *USTA* decision[4] the D.C. Circuit instructed the Commission to vary the scope of its review of the ILEC unbundling obligations under the "impair" analysis of Section 251 to include an analysis by geographic area and customer class markets.[5] Within these markets, the court further directed the Commission to consider whether average costs are likely to decline across the relevant market such that any duplication by competitors would only lead to higher unit costs for all firms.[6] In sum, the Court appeared to direct the Commission to investigate, on a market by market basis, whether demand is limited and facilities are already in place, such that building more facilities will simply drive up costs for all providers.

A. Geographic Distinctions

As discussed above, it is in fact faster and less expensive to construct fiber facilities per unit mile in rural areas than in more urban areas. However, the demand for the services that Norlight provides in rural areas is limited, typically, to widely dispersed users of high bandwidth facilities. Once facilities are extended to a given customer, for example to the county government building in a rural town, there simply will not be the demand to accommodate the capacity contained in a second fiber facility run to that same location. Where dark fiber exists in these markets, there are few instances where duplicating that fiber makes economic sense as discussed by the Court in *USTA* because either the ILEC's or the Competitor's facilities will lie unused.

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[4] *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*").
[5] *Id*. at 422.
[6] *Id*. at 426.

B. Customer Class Distinctions

Additionally, making distinctions based upon customer class for access to dark fiber also does not make sense in the geographic areas served by Norlight. First, individual residential customers do not use the dedicated fiber facilities at issue here, and Norlight does not aggregate traffic from this customer class. With regard to Norlight's business, government and university customers, there is no obvious bright line distinction that would accommodate a workable rule. Revenues or number of employees are not good indicators of the volume of service these customers require. Nor is the number of lines, as some customers may have fewer lines but generate more data traffic than a customer with more voice lines. Further, in some areas, a small industrial town for example, there may be a number of small, unrelated entities whose traffic can be aggregated using copper facilities to a Norlight local hub and transported to Norlight's primary network using dark fiber running through the town. A distinction based on customer size would not address these situations and could leave the business users in that town with no alternative to the ILEC.

IV. The Commission Should Reaffirm And Bolster Its Current Dark Fiber Rules

Adopting a rule that makes dark fiber unavailable to certain segments of the markets that Norlight serves will not foster "true" facilities-based competition as discussed by the Court in *USTA*, but rather will simply leave Norlight with the option of either paying the ILEC's inflated rates for tariffed services, or electing not to serve marginal customers. This will leave many customers throughout the region without access to the specialized services Norlight provides. This, in turn, has the potential to impact the pattern and pace of economic development in the region. The Commission must avoid this regulatory distortion of the market by ensuring that dark fiber becomes available throughout the region in a meaningful way.

Norlight believes that the analysis outlined by the Court in *USTA* supports the Commission's current rules regarding dark fiber unbundling in the geographic market served by Norlight. In these smaller and rural markets, where dark fiber exists there typically is no demand or expected growth in demand to warrant additional facilities. Further, in many cases the first carrier to lay fiber to a particular location will lay significantly more capacity than it will need because the incremental cost of burying additional fibers is negligible once the crew is on site and the trench is opened. Dark fiber is, by its very definition, this unused capacity. Requiring competitors to construct duplicate fiber facilities where there is already excess capacity in place is precisely the inefficiency that the Court in *USTA* instructed the Commission to avoid.

A. The Commission Should Clarify That Dark Fiber Includes Unterminated Fiber

Rather than simply uphold the current rules, Norlight urges the commission to take this opportunity to close some important loopholes that the ILECs have been exploiting to make dark fiber all but unavailable to competitors. First, the Commission should clarify that dark fiber

includes un-terminated fiber strands that are buried and ready for termination, whether or not the ends of a fiber pathway are attached to a fiber distribution interface (FDI), light guide cross connect (LGX) panel, splice shelf, or other facility at those locations.

Norlight believes that ILECs should not be allowed to manipulate the dark fiber rules by simply leaving fiber un-terminated and claiming that it is under construction and not available to competitors. The apparent basis for this "termination" requirement is that the definition of dark fiber contained in the *UNE Remand Order* requires that dark fiber "connect two points within the incumbent LEC's network" and be "installed and easily called into service."[7] If, therefore, the ILEC installs spare fiber facilities, but chooses not to terminate the fiber until the ILEC desires its use, the ILECs contend that the facilities are not available to competitors. The termination of fiber is an inherently simple and speedy task.[8] It cannot fairly be argued that un-terminated fiber is not "installed and easily called into service."[9] Indeed, it is completely disingenuous, not to mention anti-competitive and discriminatory, to say that fiber is not "installed and easily called into service" when a competitor asks for it, but is readily available (after marginal work) when the ILEC wants to use it.

Interpretation aside, the primary problem with the current ambiguity in the Commission's termination requirement is that it allows the ILEC to render dark fiber unbundling obligations completely meaningless. By requiring termination, the ILEC can unilaterally insulate every strand of spare fiber in its network from use by a competitor by simply leaving it un-terminated until the ILEC wants to use it. This is discriminatory on its face. The fiber is effectively there for the ILEC when it chooses to use it, yet disappears when a competitor seeks access - - they would not even have access to information about such fiber. This is surely not what the Commission intended in the *UNE Remand Order*, but it is a very real obstacle that competitive providers face every day.

B. The Commission Must Clarify That ILECs Must Make Information About Fiber Available In A Meaningful Way

Another primary example of a how the ILECs are currently exploiting ambiguity in the Commission's rules is their reluctance to provide timely or usable information on the location of dark fiber in their networks. Typically, ILECs will only inform a competitor whether dark fiber is available between two locations if the competitor specifically inquires about the particular route. If an ILEC responds that there is no dark fiber available for the route requested, there is no way for the competitor to question or confirm this determination. Moreover, the ILEC may

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[7] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, Third Report and Order, 15 FCC Rcd. 3696, ¶ 325 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

[8] *See Joint Petition of CoServ, LLC d/b/a CoServ Communications and MultiTechnology Services, LP d/b/a CoServ Broadband Services for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Southwestern Bell Telephone Company*, Docket No. 23396, Arbitration Award, 113 (April 17, 2001).

[9] *Id*. at 113 - 115.

deny that dark fiber exists between two locations based on the competitor's route request, but there may still be an alternative route that is not disclosed.

Competitors like Norlight, therefore, are relegated to guesswork and a virtual "shell game" with the ILEC. This piecemeal disclosure of the location and availability of dark fiber also leaves competitors without any effective information source so that they may include dark fiber in any of their long term network planning. This guesswork also extends to the competitor's network forecasting. In short, competitors like Norlight need to know where dark fiber is in the ILEC's network in order to have any meaningful opportunity to use it.

It its recent decision in the arbitration between Verizon and AT&T, Cox and WorldCom for the state of Virginia, the Commission made the common sense determination that meaningful competitive access to dark fiber in accordance with Section 251 requires that Verizon provide competitors with the same detailed underlying information regarding the composition and qualifications of its dark fiber facilities that it possesses itself. [10] This information includes maps and other plant record OSS capabilities.[11] Norlight urges the Commission to clarify this requirement in its rule to make plain that the ILECs must make their fiber deployment information such as local plant location records, plat records and / or Trunk Integrated Record Systems ("TIRKS"), available for review by competitors.

C. Patch Through and Splice Though Should Be Required

Finally, for the same reason set forth above relating to dark fiber termination, the Commission should require that the ILECs join lengths of fiber to make them contiguous for use by competitors. This can be done by cross connecting strands of dark fiber originating at different points but terminated at the same central office. This is known as "patch through". In addition, the Commission should also require that fiber that is already buried but not spliced to a contiguous strand along its length be spliced. This is called "splice through".

V. Conclusion

In this proceeding, the Commission has a unique and perhaps final opportunity to create a competitive environment in the markets that Norlight serves. This is a crucial moment for competitors and competition throughout the U.S. To date the ILECs have been successful in thwarting competitor's access to dark fiber and have made a mockery of the Commission's rules by exploiting several loopholes. As the ILECs gain more regulatory flexibility to compete in the long distance markets the Commission needs to ensure that they provide meaningful access to all last mile facilities, including last mile dark fiber. Norlight urges the Commission to draw from the experience and findings of competitors that are actually providing true facilities based

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[10] *See Petition of WorldCom, Inc, et al., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, 00-249, 00-215, Memorandum Opinion and Order, DA 02-1731 at ¶ 473 (rel. July 17, 2002) ("*VA Arbitration Order*").

[11] *Id*.

competitive services. Accordingly, the Commission must not fail to endorse and strengthen its current dark fiber rules. Only by doing so will the Commission ensure that the ILECs make dark fiber facilities in a real and meaningful manner.

Please let me know if you have any questions or if I can be of any further assistance.

Respectfully submitted,

/s/

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